Brown & Sharpe Manufacturing Company *and* District Lodge 64, International Association of Machinists & Aerospace Workers, AFL–CIO, and its Local Lodges 883, 1088, and 1142 *and* Local No. 119, International Federation of Professional & Technical Engineers, AFL–CIO. Cases 1–CA–19224, 1–CA–19567, 1–CA–19690, 1–CA–19958, 1–CA–20283, 1–CA–20291, 1–CA–20304, 1–CA–21508, and 1–CA–21560

August 16, 1996

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

This case is before us on remand from the United States Court of Appeals for the District of Columbia.[1] The court asked the Board to determine whether the material evidence at issue here was fraudulently concealed by the Respondent, an action that would toll the 10(b) period.

The issue of whether the material evidence in question was fraudulently concealed was addressed by Administrative Law Judge Benjamin Schlesinger in his decision dated April 5, 1989. He found that the evidence in question, specifically, the documents from the Respondent's steering committee in which the subject of bargaining ''absolutes'' was addressed, was not fraudulently concealed. The judge reasoned that because the General Counsel was aware of the existence of the steering committee and that the issue of ''absolutes'' constituted the core of the dispute, and failed to ask the Respondent for all documents related to the ''absolutes'' or the steering committee, the Respondent was under no obligation to produce the documents. The judge noted that there is no evidence that the Respondent committed any fraud. There was no misstatement, the judge found, because important questions were never asked and pertinent information was never demanded. Accordingly, he dismissed the allegations in the complaint related to the previously dismissed charges of bad-faith bargaining.

We agree with the judge that there has been no fraudulent concealment that would toll the 10(b) period in this case and require the reinstatement of the previously dismissed charges. In our Supplemental Decision and Order,[2] we stated our agreement with the standard set forth by the D.C. Circuit in *Fitzgerald v. Seamans*,[3] describing the three critical elements of the equitable doctrine detailed in *Holmberg v. Armbrecht*[4] concerning the tolling of a limitations period. These elements are : (1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part. All three elements must be present to warrant the tolling of the 10(b) period. We find that the first element is missing here.[5]

In order to find that there has been concealment, there must be ''some positive act tending to conceal the cause of action from the plaintiff, although any word or act tending to suppress the truth is enough.''[6] Here, the Respondent did not engage in any affirmative act of concealment. On the contrary, the Respondent voluntarily cooperated with the General Counsel's investigation of the unfair labor practice charges. It made available to the General Counsel several of its managers to answer questions and produced, as requested, bargaining notes, correspondence, proposals and counterproposals. When, during the course of a later investigation, the Respondent was asked for the evidence at issue, it produced that evidence without delay. There is no indication of ''any word or act'' that was designed to suppress the truth from the General Counsel.

Further, the fact that the Respondent attempted during the course of the investigation to convince the General Counsel that it had engaged in no wrongdoing is not an act of concealment. As the Board noted in *Winer Motors, Inc.*,[7] in most cases, a respondent denies the misconduct alleged or proffers an explanation, and the General Counsel must decide if the evidence presented in the investigation is sufficient to sustain the charging party's position. The denial of misconduct by the respondent is not dispositive of the charge, nor is it an act of concealment.

Our dissenting colleague argues that the Respondent is guilty of fraudulent concealment because it did not, on its own initiative, produce an item that was not requested by the General Counsel. We believe that this view is impractical and would actually hinder the Board's investigatory process. As the judge stated, a respondent in an unfair labor practice investigation is under no obligation to cooperate with the General Counsel in the investigation of the unfair labor practice charges, and may choose to supply no information whatsoever, if it so desires. Establishing a policy that holds a respondent open to a later charge of fraudulent concealment if it does not disclose unrequested infor-

[1] 50 F.3d 1088 (1995).
[2] 312 NLRB 444 (1993).
[3] 553 F.2d 220, 228 (D.C. Cir. 1977).
[4] 327 U.S. 392, 397 (1946).

[5] In our Supplemental Decision and Order, the Board found that the evidence at issue here was not ''material,'' and that therefore the tolling of the 10(b) period was not warranted. The D.C. Circuit reversed, finding that the evidence was material and remanding the case specifically on the issue of whether fraudulent concealment was present.

[6] *Richards v. Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981) (citation omitted).

[7] 265 NLRB 1457, 1459 (1982).

mation that relates to the investigation of an unfair labor practice charge is counterproductive. Many respondents may understandably decide that cooperating with the General Counsel's investigation is too onerous, in which case the Board's Regional Offices will be forced to put forth the time and expense of securing an investigatory subpoena in order to determine whether to issue complaint.

In addition, such a policy would create a burden on a respondent to reveal, on its own initiative, material information that is potentially damaging to its defense. Where there is no affirmative act to mislead the General Counsel, a respondent should be permitted to present its defense to unfair labor practice charges during the investigation without being required to produce all the material information within its possession. Clearly, where the General Counsel requests or subpoenas certain information and a respondent falsely denies that such information exists, deliberate concealment can be found. A similar finding would be appropriate if a respondent affirmatively represented that it was providing *all* relevant material, while actually withholding certain information. Neither is the situation here, however, and we will not find fraudulent concealment where a respondent is under no duty to disclose information and has engaged in no positive act of concealment. Accordingly, we dismiss the complaint.[8]

ORDER

The complaint is dismissed.

CHAIRMAN GOULD, dissenting.

Contrary to my colleagues, I would find that the Respondent has engaged in fraudulent concealment of material facts and would remand the case to the judge for a decision on the merits. In my view, all three critical elements set forth in *Fitzgerald v. Seamans*[1] are present: (1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part. In its most recent decision in this case, the D.C. Circuit found that the evidence at issue constitutes ''material facts'' within the meaning of *Fitzgerald*, and remanded the case to the Board for a determination of whether the evidence, although material, was actually fraudulently concealed.

I would find that fraudulent concealment has occurred by virtue of the Respondent's deliberate withholding of the steering committee documents. The Respondent gave the appearance of full cooperation with the General Counsel during the course of the investigation, and provided the General Counsel with many witnesses and documents relevant to the charges. But the Respondent was also in possession of a ''smoking gun,'' and was the only party who was aware of its existence. Although the General Counsel was aware that the Respondent had formed a steering committee, the General Counsel was not aware of its significance or the fact that it generated documents that were material to the allegations being investigated. That information rested solely with the Respondent, and when it chose to affirmatively withhold that information while giving the General Counsel the impression that it was fully cooperating with the rest of the investigation, an affirmative act of concealment took place.

The majority finds no fraudulent concealment because they conclude that there was no obligation to provide the information to the General Counsel, and no affirmative act of concealment of the documents at issue. However, by agreeing to cooperate with the General Counsel, and by giving the impression of full cooperation, the Respondent has created an obligation to be forthcoming with the General Counsel. Once this obligation is created, then the deliberate withholding of material evidence is an affirmative act of concealment.

The majority further states that to require a respondent to come forward with material evidence that was not requested would hinder the General Counsel's ability to investigate charges because respondents would refuse to cooperate. This reasoning does the General Counsel a disservice. In the circumstances here, the General Counsel's investigation would have been better off with no cooperation from the Respondent than with partial cooperation given under the guise of full cooperation. The result of such partial cooperation was that the General Counsel was effectively lulled into believing that there was no material evidence being withheld,[2] and the charges were dismissed by the Region.

I would also find that the General Counsel exercised due diligence in the course of the investigation of the charges. The judge's decision implies that the General Counsel was at fault here for not asking for the steering committee documents. However, as noted above, the General Counsel was unaware that these documents existed, and was therefore unable to request them. The General Counsel did inquire during the course of the investigation about the steering committee and about the concept of ''absolutes'' at the bargaining table. This inquiry placed the Respondent on notice that any documents it had pertaining to ''absolutes'' would be

[8] Our dismissal in case 299 NLRB 586 (1990) of the 8(a)(5) allegations concerning the Respondent's failure to provide the Union with the names of strike replacements who had been terminated is not at issue here and is reaffirmed.

[1] 553 F.2d 220, 228 (D.C. Cir. 1977).

[2] As noted by the D.C. Circuit in *Hobson v. Wilson*, ''a defendant cannot avail himself of the bar of the statute of limitation, if it appears that he has done anything that would tend to lull the plaintiff into inaction.'' 737 F.2d 1, 37 fn. 113 (1984) (citing with approval *Hornblower v. George Washington Univ*., 412 App. D.C. 64, 75 (1908) (quoted in *William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1191–1192 (D.C. 1980)).

material to the investigation, but the Respondent did not indicate that it had any documents relevant to these inquiries. The Respondent was the only party who knew of the existence of this documentary evidence, and was in a position where it should have come forward with that evidence. During the course of the investigation, the General Counsel was given many documents related to the case, but those pertaining to the development of the ''absolutes'' were notably missing. The General Counsel was given the impression that the Respondent was cooperating fully, and had no reason to suspect that additional material evidence existed. Accordingly, I would find that the General Counsel did exercise due diligence in the course of the investigation.

Because all three elements of the *Fitzgerald* standard are satisfied, I would find that the Respondent engaged in fraudulent concealment, that the dismissed charges should be reinstated, and that the case should be remanded to the judge for a decision on the merits.